2004

The State of Utah In the interest of A.D. and Z.D., Children under eighteen years of age. Office of the Guardian ad Litem v. S.B.D. : Brief of Respondent

Utah Supreme Court

IN THE UTAH SUPREME COURT

THE STATE OF UTAH	:	
In the interest of	:	
A.D. & Z.D.,	:	
Children under eighteen	:	
years of age.	:	
OFFICE OF THE GUARDIAN		
ad LITEM,	:	
Petitioner,	:	
v.	:	Case No. **20040837-SC**
S.B.D.,	:	
Respondent.	:	

BRIEF OF GUARDIAN ad LITEM

ON CERTIORARI REVIEW OF A FINAL ORDER
OF THE UTAH COURT OF APPEALS
REVERSING AN ADJUDICATION ORDER
OF THE THIRD DISTRICT JUVENILE COURT
HONORABLE OLOF A. JOHANSSON, PRESIDING.

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IN THE UTAH SUPREME COURT

THE STATE OF UTAH In the interest of **A.D. & Z.D.,** Children under eighteen years of age.	: : : : :	
OFFICE OF THE GUARDIAN ad LITEM, Petitioner, **v.** **S.B.D.** , Respondent.	: : : : :	Case No. **20040837-SC**

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PARTIES

The Children:

A.D., born September 19, 2000. She is the four year-old daughter of the Appellant. She and her brother are the real parties in interest. Her best interests was represented by the Office of the Guardian ad Litem.

Z.D., born April 6, 2002. He is the two year-old son of the Appellant. He and his sister are the real parties in interest. His best interests was represented by the Office of the Guardian ad Litem.

The Parents:

S.B.D., "the Father." He is the Father of the two Children. He was the Respondent at the trial level and an Appellant before the Court of Appeals. He is a Respondent before this Court.

L.D., "the Mother." She is the Mother of the two Children. She was the Respondent at the trial level. She was not a party before the Court of Appeals.

The Agency:

Division of Child and Family Services, "the Division" or **"DCFS."** The Division was the petitioner at trial and the appellee before the Court of Appeals. The Division is also petitioning for a writ of certiorari.

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4. Letter from Bruce Herman, M.D., Karen Hansen, M.D. and Lori D. Frasier, M.D. dated December 17, 2002. State's Exh. 7.

5. John T. Smith letter dated December 11, 2002. Def. Ex. 15.

6. Utah Supreme Court Order granting certiorari dated December 22, 2004.

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IN THE UTAH SUPREME COURT

THE STATE OF UTAH In the interest of **A.D. & Z.D.** Children under eighteen years of age.	: : : : :	
OFFICE OF THE GUARDIAN Petitioner, **v.** **S.B.D. & L.D.,** Respondents.	: : : : :	Case No. **20040837-SC**

BRIEF OF GUARDIAN ad LITEM

JURISDICTION

This Court has jurisdiction over the petition for writ of certiorari to review the court of appeals's opinion, entered July 29, 2004. Jurisdiction is conferred by Utah Code Ann. § 78-2-2(5) (2004).

QUESTIONS PRESENTED FOR REVIEW

1. This Court framed the sole question for review: "Whether the court of appeals applied the correct standard of review in its assessment of the sufficiency of the evidence." Attachment 6. This Court exercises its certiorari jurisdiction by reviewing the decision of the court of appeals and not that of the trial court. In re B.B., 2004 UT 39, ¶ 5, 94 P.3d 252. The issue of whether the court of appeals applied the appropriate

standard of review to assess sufficiency of evidence is one of law, which this Court reviews for correctness. Hughes v. Cafferty, 2004 UT 22, ¶ 18, 89 P.3d 48 (citing State v. Pena, 869 P.2d 932, 936 (Utah 1994)).

2. Given that sufficiency-of-evidence reviews have a marshaling requirement, a related question is whether the Utah Court of Appeals may review the merits of a sufficiency-of-the-evidence claim where the appellant has not marshaled the evidence. This Court has determined that, because the court of appeals functions as an appellate body and not as a trier of fact, it may not. "The court of appeals does not review the trial court's factual findings where the party challenging those findings fails to marshal the evidence. Instead, the court of appeals must 'assume that the record supports the findings of the trial court.'" Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶ 10, 94 P.3d 193 (quoting Moon v. Moon, 1999 UT App 12, ¶ 24, 973 P.2d 431) (emphasis added).

STATUTES, RULES, CONSTITUTIONAL PROVISIONS

> "Abused child" includes a minor less than 18 years of age who has suffered or been threatened with nonaccidental physical or mental harm, negligent treatment, or sexual exploitation.

Utah Code Ann. § 78-3a-103(1)(a)(i).

> In determining whether a minor is an abused child or neglected child it may be presumed that the person having the minor under his direct and exclusive care and control at the time of the abuse is responsible for the abuse or neglect.

Utah Code Ann. § 78-3a-305.1.

OFFICIAL AND UNOFFICIAL REPORTS OF OPINION

In re Z.D. and A.D., 2004 UT App 261, 98 P.3d 40.

STATEMENT OF CASE

Nature of Case: This Court granted certiorari review over a single question: "Whether the court of appeals applied the correct standard of review in its assessment of the sufficiency of the evidence." Attachment 6. The final order on review is an opinion where the Utah Court of Appeals reversed a juvenile court adjudication order determining that Z.D. is an abused child and that S.D. is a neglected child as a sibling-at-risk.

Course of Proceedings: The Division filed a petition seeking juvenile court jurisdiction over the two Children. R.29-34.

Disposition at Trial: After a thirteen-day trial on the merits, the juvenile court prepared a seven-page, single-spaced memorandum decision analyzing the evidence and concluding that the younger child was abused, the older child was neglected as a sibling at risk, and therefore both Children came within the jurisdiction of the juvenile court. See Attachment 1. The Father appealed the adjudication order. R.847.

Disposition on Appeal: The Utah Court of Appeals issued an opinion reversing the juvenile court's adjudication order. In re Z.D., 2004 UT App 261, 98 P.3d 40. Attachment 2. This Court granted certiorari review over one question: "Whether the court of appeals applied the correct standard of review in its assessment of the sufficiency of the evidence." Attachment 6.

STATEMENT OF FACTS

In his appellate brief to the Utah Court of Appeals, the Father did not marshal the evidence supporting the juvenile court's findings. Instead, he selected those portions of the record, including statements from his own expert witnesses, that supported his version of the facts, which were disputed, and which were ultimately rejected by the juvenile court. The court of appeals, did not adopt the juvenile court's findings, but, in a surprising move, virtually adopted the fact statement from the Father's brief. What follows is a brief summation of the supporting evidence presented during thirteen days of

trial. The best overview of the facts is in the juvenile court's seven pages of findings. Attachment 1. See Chen v. Stewart, 2004 UT 82, ¶ 30, 100 P.3d 1177 (appellate court "heavily" relies on findings of fact to resolve fact-intensive issues of law).

Up until Saturday morning, November 16, 2002, both parents stated they were able to stand seven month-old Z.D. ("the Child") on their laps while he held onto their fingers, allowing him to kick his feet against their laps and bear weight on both legs. State Exh. 3, 6 & 7. The Mother later remembered that she had played with the Child that morning, holding him while he bounced both his feet against her lap. Exh. 6. Later that morning, she and the maternal grandmother ("the Grandmother") left to spend the day shopping, leaving both seven-month-old Z.D. and two year-old A.D. in the Father's care. Exh. 6. The Father recalled that between 12:30 and 1 p.m., when he claimed Z.D. had awakened from a nap, the Child could no longer bear weight on his left leg, he favored the leg, and he cried when it was touched. Def's Exh. 3. When the Mother returned home late Saturday afternoon, she also noticed that the Child could no longer bear weight on his left leg and was favoring it. Id.

Approximately twenty-four hours after the Father first noticed something was wrong, he brought the Child to Primary Children's Medical Center. The Child was

immediately given Lortab for the pain. Tr.63. The medical staff's initial impression was that the injury was non accidental. Tr.26.

The Child was seen by pediatrician Bruce Herman, M.D., who diagnosed the Child with a broken left femur. The bone was broken completely through, it was slightly displaced and a fragment had broken off. State's Exh. 6. The Parents initially claimed the Child was suffering from a flu shot. Exh. 1. They then claimed the injury could have been caused by their two year-old daughter who was "rough" with the Child. Tr.24-25, Exh. 1. When the Parents were told that neither explanation fit the injury, they denied that the Child had suffered any recent trauma severe enough to cause the injury. A skeletal survey revealed the Child had also suffered a skull fracture, which had healed. Again, neither Parent could offer an appropriate explanation for the skull fracture, although they suggested the Child could have fractured his skull when he fell twelve inches from a baby swing onto a carpeted floor. State's Exh.6.

The Division filed a petition seeking juvenile court jurisdiction over the Child and his two year old sister. R.29-34. The matter was tried to the juvenile judge, who listened to experts testify regarding the age of the femur fracture, the timing of the symptoms, the nature of the skull fracture, the identity of the various care givers, the Parents' changing

stories, and the fact that the femur fracture was nonaccidental. The trial court agreed with the Division's and Guardian's experts that the Child's femur was broken, in a nonaccidental[1] manner, during the time he was alone with the Father. See Letter from Dr. Herman, Dr. Frasier and Dr. Hansen, State's Exh. 6. Attachment 4.[2]

The Father had his own theory of the femur fracture: He claimed the Grandmother had inadvertently broken the Child's femur three days earlier, on Wednesday, in the presence of the Child's mother, while trying to unstick the Child's leg from a walker ("the walker theory"). The Grandmother testified that after the Child had supposedly broken his femur, the largest bone in his body, he cried for only three to five seconds and was quickly calmed by a few pats on the back. Tr. 222-23, 291. The Parents claimed the pain of the broken femur was masked for three days by Tylenol, which was why the Child showed only normal fussiness until Saturday afternoon. At trial, the Parents

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[1] The word "nonaccidental" is the operative term in determining whether an injury amounts to abuse. Utah Code Ann. § 78-3a-103(1)(a)(i) ("'Abused child' includes a minor less than 18 years of age who has suffered or been threatened with nonaccidental physical or mental harm, negligent treatment, or sexual exploitation.").

[2]Bruce Herman, M.D., when pressed by the defense to state a possible mechanism for the fracture, opined the mechanism could "likely" have been axial loading. Again, when pressed, he quantified the term "likely" to mean 51/49 percent. However, he, along with Dr. Frasier and Dr. Hansen, and even defense expert Dr. Smith, agreed that the clinical evidence supported that the Child was injured, by some mechanism, on Saturday, when he was alone with the Father. State's Exh. 7 & Def. Exh. 15. Attachment 5.

denied their earlier statements, which were contemporaneously documented by several witnesses, in which they said the Child could, as late as Saturday morning, bear weight on his left leg when they had him stand on their laps. Affidavit of Bruce Herman, State's Exh. 39, Attachment 3, Tr.771.

In further support of the walker theory, the Mother claimed that she always diapered and dressed the Child in such a manner as to never touch his left leg. She demonstrated this method to the judge, who found it not credible. Tr.863-64, R.879. The Grandmother also demonstrated her attempt to unstick a doll's leg from a walker. Tr.223.[3] Again, the juvenile court found it not plausible that the Child would suffer a complete femur fracture and be completely comforted and quieted in only three to five seconds by a few pats on the back. Tr.222-23. R.879, Attachment 1.

The walker theory was rejected by Dr. Herman, who was permitted to sit through and listen to the testimony of the defense experts. Tr.69, 312. The walker theory was also rejected by Dr. William Nixon, a pediatric radiologist, and by Dr. Karen Hansen, of

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[3] The transcripts in no way convey the bizarre nature of this demonstration, nor do they convey the detrimental effect the demonstration had on the Mother's credibility and on the walker theory. The court of appeals never had the benefit of viewing this important demonstrative evidence. See In re Water Rights v. Pinecrest Pipeline, 2004 UT 67, ¶ 67, 98 P.3d 1 (appellate court "particularly reticent to second-guess" findings based on demonstrative evidence).

the Safe and Healthy Families Team of Primary Children's Medical Center. Tr.709, 1545.[4]

The juvenile court rejected the walker theory. The court concluded that the Child's femur fracture occurred Saturday, while he was in the care of the Father. R.2-7, 29-34. The court concluded that the Child had earlier suffered a skull fracture, and not, as the Parents claimed, a disappearing skull suture. The court was unable to determine whether the skull fracture was accidental or nonaccidental because the fracture was older than the femur fracture and difficult to date. R.879, Findings at 2, 6. Still, the juvenile court concluded that the femur fracture was nonaccidental and that it occurred when the Child was alone with the Father and therefore he was responsible for the injury. Utah Code Ann. § 78-3a-305.1 (2004) (court may presume that the person having direct and exclusive care and control at the time of the abuse is responsible for the abuse).

The Father appealed the adjudication order. R.847. Four of the Father's five appellate claims involved sufficiency of the evidence.[5] Rather than marshal the evidence,

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[4]In rejecting the walker theory, Dr. Nixon testified: "This is the biggest bone in his body at the time. If this was a common fracture that just happened with every day type care, we'd be seeing them all the time." Tr.709.

[5]The fifth claim went to the trial court's refusal to admit propensity evidence. See Father's Appellate Brief at 44-45.

he re-argued only that portion of the controverted evidence that supported his theory of the case, citing only to those portions of the record supporting his case, and sometimes failing to cite at all. See Father's Appellate Brief at 17-19, 22-43, 45-47.

In a surprising move, the Utah Court of Appeals reversed the juvenile court's adjudication order. In re Z.D., 2004 UT App 261, 98 P.3d 40. Attachment 2. Relying on case law from 1955, the panel gave almost no deference to the findings on the basis that the findings were judge-made rather than jury-made. Lovett v. Continental Bank & Trust Co., 4 Utah 2d 76, 286 P2d. 1065, 1968 (1955) (fact that appellate body could come to different conclusion on same set of facts is basis for reversal); cf, In re S.T., 928 P.2d 393, 401 (Utah Ct. App. 1996) (fact that evidence supports more than one result does not justify reversal of finding). In addition, the panel justified its re-weighing of the evidence by speculating that the juvenile judge "undoubtedly" could not remember and assimilate evidence from a thirteen-day trial. Id. at ¶¶ 1 n1, 19, 26 ("Undoubtedly, this elongated trial made it difficult for the trial judge to recall the evidence and to place it all in context."). Finally, the Z.D. court tacitly approved the Father's failure-to-marshal by including a background statement that virtually mirrored the Father's statement of facts, including those portions that had no citation, nor support from the record, and which were in fact refuted by the record.

The court of appeals's holding was based on burden of proof and not standard of review: "The evidence does not clearly and convincingly establish that Z.D.'s fracture was caused by an axial load sometime on Saturday when he was in Father's care." Z.D. at ¶ 28 (emphasis added).

In response to separate petitions for certiorari filed by the Guardian ad Litem and the Assistant Attorney General, this Court granted review over one issue: "Whether the court of appeals applied the correct standard of review in its assessment of the sufficiency of the evidence." Attachment 6.

ARGUMENT

1. THE COURT OF APPEALS DID ITS OWN WEIGHING.

This Court narrowed the issue on certiorari to one: "Whether the Court of Appeals applied the correct standard of review in its assessment of the sufficiency of the evidence." Attachment 6. The law on this issue is well-settled. When challenging sufficiency-of-the-evidence, an appellant must marshal evidence supporting the challenged finding and then demonstrate how, despite this evidence, the challenged finding is against the clear weight of evidence. 438 Main Street v. Easy Heat, 2004 UT 72, ¶ 69, 99 P.3d 801. Where the appellant has not marshaled the evidence, the appellate

court does not review the claim, but assumes that all findings are supported by the evidence. Id. at 70; Chen v. Stewart, 2004 UT 82, ¶ 19, 100 P.3d 1177.

In cases where an appellant has fully marshaled the evidence, which is not the case here, the appellate court then reviews the challenged finding using a clearly erroneous standard of review. Utah R. Civ. P. 59(a). That means the reviewing court "must decide that the factual findings made by the trial court are not adequately supported by the record, resolving all disputes in the evidence in a light most favorable to the trial court's determination." State v. Pena, 869 P.2d 932, 936 (Utah 1994) (emphasis added). Where, as in this case, the findings are based on demonstrative evidence, this Court is "particularly reticent to second guess" such findings. In re Water Rights v. Pinecrest Pipeline, 2004 UT 67, ¶ 67, 98 P.3d 1.

The Pena case came to the Utah Supreme Court on certification from the court of appeals to resolve the court of appeals's ongoing "confusion" regarding standard of review. 869 P.2d at 935 & n.2. In response, this Court clarified its functional jurisprudence of appellate review standards. Id. at 937-39. Pena outlined "a fixed allocation of power and responsibility between the trial and appellate courts . . . regarding questions of fact." Id. 869 P.2d at 938 (emphasis added). Pena held "it will never be

appropriate for an appellate court to overturn a trial court's factual determinations when they have substantial record support." Id. Pena determined that a finding-of-fact review was an area in which "the appellate court has a permanently limited role." Id. (emphasis added).

Pena placed sufficiency-of-evidence reviews "at the extreme end of the discretion spectrum." Id. at 938-39 (citing Professor Maurice Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above, 22 Syracuse L. Rev. 635, 662-63 (1971).[6]

The court of appeals has, for the most part followed Pena when reviewing challenged findings.[7] Likewise, this Court has followed Pena, in particular, by chastising

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[6]The Rosenberg article can't be found on the Web or in the Matheson Courthouse Library. It can be found in the stacks at the S.J. Quinney Law Library.

[7] See e.g., In re A.C., 2004 UT App 255, ¶ 12, 97 P.3d 706; In re S.T., 928 P.2d 393, 401 (Utah Ct. App. 1996) (fact that evidence supports more than one result does not justify reversal of finding); In re R.A.J., 1999 UT App 329, ¶ 12, 991 P.2d 1118 (responsibility of juvenile judge to hear, consider and weigh evidence); In re E.R., 918 P.2d 162, 164 (Utah Ct. App. 1996) (recognizing specialized expertise of juvenile judges); In re G.V., 916 P.2d 918, 920 (Utah Ct. App.1996) (juvenile court's function to weigh and assess credibility of expert testimony).

The cases that have not followed Pena are outstanding in their rarity as well as their weigh-it-ourselves temerity. See e.g., In re Z.D., 2004 UT App 261, ¶ 1 n.1 & 19, 98 P.3d 40 (less deference given to bench finding, appropriate to determine whether clear and convincing standard met, trial judge can't be expected to remember evidence in multi-day trial); In re N.D. v. A.B., 2003 UT App 215, ¶ 14 (re-weighing credibility factors of Utah R. Evid. 803(24) to find the evidence "cut both ways"); In re V.K.S., 2003

appellants for (1) not marshaling the evidence; (2) re-arguing only the favorable facts, and (3) seeking a second opinion. Recently, this Court added a fourth transgression to the list: (4) omitting "certain minor evidence, that in combination, could" support the finding. Easy Heat at 2004 UT 72, ¶ 71. See also Chen, 2004 UT 82 at 75-76 ("the requirements of marshaling still do not appear to be understood with the sense of clarity and urgency we desire").

In a major departure from Pena, the Z.D. opinion tacitly condoned all four of these appellate shortcomings by reversing a fact-intensive finding in the face of (1) no marshaling; (2) a re-arguing of only the favorable facts; (3) a bid for a second opinion; and (4) an omission of minor, as well as major, evidence.[8]

In the present case, despite the clear language and despite the court of appeals's normal adherence to Pena, the panel asserted that it need not resolve all conflicts in favor

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UT App 13, ¶ 7, 63 P.3d 1284 ("we must do our own weighing"); Davis v. Davis, 2001 UT App 225, ¶ 6, 63 P.3d 676 (appellate court does its own weighing); In re T.H. v. R.H., 860 P.2d 370, 373 (Utah Ct. App. 1993); State v. Saddler, 2003 UT App 82, 67 P.3d 1025 (no deference to magistrate's ruling on affidavit), rev'd, 2004 UT 105 (granting great deference to magistrate).

[8]Recently, this Court extended the duty to marshal to issues of law that are "extremely fact-sensitive." Chen, 2004 UT 82 at ¶ 20 (failure to marshal evidence underlying facts supporting challenged legal issue proved "fatal" to legal argument).

of the trier of fact and it need not defer to a finding if it was judge-made and not jury made. See Z.D. at ¶ 19. True to its word, the Z.D. panel proceeded to re-weigh the evidence and to make its own findings, without the benefit of marshaling, and without the benefit of viewing the demonstrative evidence. As a result of its re-weighing, the panel determined that the Child was injured on Wednesday by the Grandmother in the walker incident and not by the Father on Saturday in a non-accidental manner.[9]

Thus, the court of appeals disregarded its own well-settled case law to second-guess the weight, credibility and interpretation of the evidence, including demonstrative evidence. The question becomes whether the appellate panel had the authority to even reach the sufficiency-of-the-evidence issue where the evidence had not been marshaled.

2. THE COURT OF APPEALS ABANDONED THE MARSHALING REQUIREMENT.

This Court has set forth the appropriate appellee response to a failure-to-marshal-argue-the-favorable-facts brief: The appellee should point to a scintilla of evidence to refute the claim of no evidence to marshal. Chen v. Stewart, 2004 UT 82, ¶ 80, 100 P.3d

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[9]The word "nonaccidental" is the operative term in determining whether an injury amounts to abuse. Utah Code Ann. § 78-3a-103(1)(a)(i) ("'Abused child' includes a minor less than 18 years of age who has suffered or been threatened with nonaccidental physical or mental harm, negligent treatment, or sexual exploitation.").

1177. This Court has held that an appellant may not shift the burden to the appellee to marshal the evidence. Id. at ¶ 78. Written and oral argument should be confined to urging the court to decline to consider the claim and then, as a back up position, pointing to a scintilla of evidence supporting the challenged finding.[10]

In turn, the appropriate appellate court response, the response requested by the Guardian and the Assistant Attorney General in this case, is for this Court to "affirm the court's findings on that basis alone." Id. at ¶ 80.[11]

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[10]Here, the Guardian did just that, relying, to the detriment of her young clients, on both appellate courts' instructions on handling a failure-to-marshal case. In fact, the Guardian pointed out that she was prepared to argue the law, but felt it was inappropriate to argue the facts before an appellate panel because the appellate court was required to presume that the evidence supported the findings. Chen, 2004 UT 82 at 3; Harding v. Bell, 2002 UT 108, ¶ 21, 57 P.3d 1093. A panel member disagreed, directing the Guardian to argue the facts anyway.

[11] This Court described the alternative appellate task where there is no marshaling would be to comb through the record, assemble the evidence, identify how the trial court used this evidence to support the challenged finding and then determine that the decision was clearly erroneous. This Court described the task as a "colossal commitment of time and resources." Chen, 2004 UT 82, at ¶ 82 n.16. In this case, this Court would have to comb through 879 pages of legal documents and exhibits and 1592 pages of transcripts. Even then, this Court would not have access to the demonstrative evidence not reflected in the transcripts. In re Water Rights v. Pinecrest Pipeline., 2004 UT 67, ¶ 33, 92 P.3d 1 (appellate court "particularly reticent to second-guess findings based on demonstrative evidence).

In the spirit of offering "a scintilla of evidence that supports a court's findings," Chen, 2004 UT 82, ¶ 82, and mindful that this is not the forum to argue the facts, the following is offered to provide a representative example of where the panel relied to its detriment on the Father's statement of facts, which statement was contradicted by the record.

The Z.D. panel quoted only that portion of the Dr. Smith letter that was quoted out of context in the Father's brief:

> Smith wrote a letter dated December 11, 2002 in which he explained that the fracture could result from the forceful wedging of the leg over a fulcrum (as in the walker incident), but that it would be "difficult to know the degree of force that would be required to produce this fracture by this mechanism."

Z.D. at ¶ 9. This portion of the letter, when read in isolation and at first blush, appears to support the Father's walker theory. In fact, the letter, which was later admitted in its entirety over defense counsel's vehement objection, rejects the walker theory, as shown in its concluding paragraph:

> I feel that once this type of fracture occurred, given the amount of displacement on the initial film, that we would expect to have significant pain with activities such as diaper changing or any manipulation of the limb. It is, therefore, difficult to match the chronology of the fracture to the onset of symptoms being approximately three days later.

Def. Exh. 15, Attachment 5.

Because the Father did not marshal the evidence and because the court of appeals did not perform the "colossal commitment of time and resource" to comb through the voluminous record, the court of appeals had no basis to reverse the fact-intensive finding of abuse. Chen, 2004 UT 82 ¶ 82 n.16.

CONCLUSION

This Court should reverse the court of appeals's opinion and should affirm the juvenile court's adjudication order without remand to the appellate court because the Z.D. panel abandoned the marshaling requirement and abandoned the concomitant presumption that the record supports the findings. In addition, the Z.D. court did not give due deference to the trier of fact who heard the witnesses, saw the demonstrative evidence, chose among the experts and determined credibility and weight.

DATED this 17th day of January 2005.

MARTHA PIERCE
Guardian ad Litem

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of January 2005, I caused to be mailed, postage prepaid, a copy of the foregoing to:

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MARTHA PIERCE
Guardian ad Litem

ATTACHMENTS

1. Findings of Fact, Conclusions of Law, and Decree, entered August 19, 2003. Supp. R. 879.

2. In re Z.D. and A.D., 2004 UT App 261.

3. June 12, 2003 Affidavit of Dr. Bruce Herman. State's Exh. 39.

4. Letter from Bruce Herman, M.D., Karen Hansen, M.D. and Lori D. Frasier, M.D. dated December 17, 2002. State's Exh. 7.

5. John T. Smith letter dated December 11, 2002. Def. Ex. 15.

6. Utah Supreme Court Order granting certiorari dated December 22, 2004.

ATTACHMENT 1

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECREE,
AUGUST 19, 2003
Supp. R. 879.

In the Third District Juvenile Court
Salt Lake County, State of Utah

State of Utah, interest of Dunsmore, Alexis 9-19-2000 Dunsmore, Zachary 4-6-2002 Persons under eighteen years	Findings of Fact, Conclusions of Law, and Decree Case Nos. 169373, 169372

The above matter came before this Court for trial on 3-21, 3-24, 4-21, 5-1, 5-2, 5-6, 5-8, 5-12, 5-19, 5-21, 5-27, 6-11, and 6-12 of 2003, pursuant to the State's Verified Petition filed 11-22-2002. The State was represented by Amy Jackson, Assistant Attorney General; the Office of Guardian ad Litem was represented by Robert Parrish, attorney at law; the mother, Lisa Dunsmore, was present and represented by Ronald Wilkinson, attorney at law; the father, Stephen Dunsmore, a.k.a. Brig Dunsmore, was present and represented by Blake Nakamura, attorney at law.

Having now considered the testimony of witnesses, reviewed the numerous exhibits, and listened to arguments of counsel, and/or, read the closing arguments submitted at counsel's option, the Court finds and concludes that the State has proven its Verified Petition of 11-22-2002 by clear and convincing evidence in the following particulars, and makes the following

Findings of Fact:

1. That the parents of the above named children are Stephen, a.k.a. Brig, and Lisa Dunsmore, who reside in West Jordan, Utah;

2. That on or about 11-17-2002, Zachary, a seven (7) month old, non-ambulatory child, was admitted to the Primary Children's Medical Center suffering from a fractured femur;

3. The fractured femur was due to non-accidental trauma and not self-inflicted;

4. The femur fracture suffered by the child occurred at a time when he was under the direct and exclusive care and control of his father, Stephen, a.k.a. Brig, Dunsmore;

5. The explanations as to the cause of the injury provided by the parents is inconsistent with the medical testimony;

6. Initial skeletal surveys taken upon the child's admission to the hospital, also revealed a possible skull fracture to the child's head. Subsequent additional tests were performed on the child's skull to definitively answer if there

was a skull fracture, but the medical experts could not reach a consensus on the issue. However, from the evidence presented, the Court is convinced there was a skull fracture, and not an associated suture as the parents aver. Nonetheless, neither the source nor the cause of the skull fracture is known or suggested, and it has not been established whether it was accidental or non-accidental in nature. Neither has it been established in whose care and control the child was under when the alleged skull fracture occurred nor when it may have occurred. These issues are all problematic and, therefore, the Court finds the evidence is inconclusive and insufficient to conclude that the skull fracture was the result of neglect or abuse by either parent.

Court's Commentary:

This has been a most difficult case, not only because of its length, but because of the complex factual and legal issues presented. The Court is not insensitive to the emotions of all parties involved in the trial of this matter. The Court ascribes no ill-will toward either parent in making its findings. The issue at trial has never been about the character of the parents nor about their love for their children. The Court senses the love the parents have for their children. Rather, the facts dictate the Court's findings and conclusions.

Through a rather protracted proceeding, the Court has been handed a State's case built primarily on medical, communicative, and circumstantial evidence. The parents' cases are also built around medical testimony coupled with an explanation as to the instrumentality involved, what the parents said and did, but also on circumstantial evidence. Not surprisingly in this type of case, there has been no testimony from any eyewitnesses who allegedly observed how the leg injury occurred. Rather, the Court is left with attempts to reconstruct what happened from medical experts, and from testimony by persons close to the events as they developed.

The parents claim neither any personal knowledge nor provide any explanation as to the source of the injury. However, the grandmother recalls the child's leg getting caught in an infant "walker" on Wednesday, 11-13-2002. As she attempted to place the child into the "walker", the child let out a shrill cry. In her efforts to extract the child's leg from the "walker", she asserts that she must have caused the femur to fracture during that event. She demonstrated to medical staff and in the court setting how she must have accidentally or inadvertently caused the fracture to the leg. Hers is the only explanation provided the Court as to the source of the fractured femur from any of the

parties.

Medical experts testified and generally agreed that the pain and the symptoms attendant to the leg fracture would be significant and that the fracture would be extremely painful to the child. According to the medical testimony, symptoms of fussiness, irritability, sensitivity to touch, inability to bear weight on the injured leg, crying, and general discomfort would all be expected to be present from the moment of initial infliction of the injury, and would persist in greater or lesser degree depending upon the type of activity exerted on the child. Daily changing of diapers, clothing, bathing, handling of child for naps, being held by parent or others, being transported in a car, being placed in and out of a car seat, etc., are all routine activities which would be noticably affected by the child's response to the pain of the injury, and are readily detectable and observable by a caretaker.

From Wednesday, 11-13, to Saturday, 11-16, neither the mother nor the grandmother noticed any unusual, or out-of-the ordinary, stress, pain or discomfort to the child. The grandmother described the child as being comforted by her within three (3) to five (5) seconds after the shrill cry, and he appeared fine for the rest of the day. He remained in the "walker" and she noticed no swelling or pain in his leg. She testified she checked his leg and observed nothing out of the ordinary and she stated he exhibited no discomfort. She said the child was handled in and out of a car seat without distress. To her, everything seemed normal with the child.

The mother testified the child exhibited no more than usual or ordinary fussiness on Thursday, 11-14, or Friday, 11-15, although the child did have flu shots on Friday. Even on the morning of Saturday, 11-16, she fed the child, played and talked with him, even placed him in the "walker" and removed him again when he got fussy, and placed him on the floor in a "burrito" wrap (a word used to describe the method of firmly wrapping a blanket around an infant). She stated he appeared normal and fine when she went shopping with her mom (grandmother), and left him in the care of his father, Steve or Brig, Dunsmore. While shopping, she called home about three (3) times to check on the child, and nothing out of the ordinary was reported by the father. When she arrived home in the evening about six p.m., or shortly thereafter, the child was on the floor on a blanket. She picked him up, interacted with him, and held him on her lap. She noticed his left leg appeared a bit bent, so she rubbed it thinking it was due to the flu shot. It was then she noticed he did not want to stand on his left leg. As his symptoms worsened,

the father took him to Primary Children's Medical Center for examination on Sunday, 11-17. Subsequently, the child was admitted to the hospital with a fractured femur.

The Court has received testimony from numerous doctors, family members, and others. Where permitted or allowed, each has rendered an opinion. Many of the expert witnesses were called in after the fact, so to speak, to assist in possibly explaining what could have happened, and what the possible instrumentality may have been which caused the leg injury.

The chief attending physician on duty at the time of the admission of the child, unequivocally testified that the femur fracture was the result of non-accidental trauma, and would have required significant and excessive force to cause such a complex femur fracture. The same attending physician observed the demonstration by the grandmother of the "walker" as the possible instrument and he medically discounted it as the source of injury. His opinion was supported by several other physicians, all experienced and trained in diagnosing and treating cases of suspected child abuse, or non-accidental trauma. Several of these doctors currently serve on the child abuse protection team at the Primary Children's Medical Center.

Assuming for the sake of argument that the source of the injury was the "walker", then one has to assume it (the injury) occurred on Wednesday, 11-13-2002, as described by the grandmother, and as asserted by both parents. The father describes symptoms as suddenly appearing in the afternoon of Saturday, 11-16. The father testified he saw little of the child on either Wednesday, 11-13, or Thursday, 11-14, or Friday, 11-15, because he got home from work after the child had been put to bed for the night. As described by the father, and confirmed by the hospital physicians and other doctors, the attendant symptoms of the leg fracture were significant, and the doctors testified that the symptoms would be present from the initial receipt of the injury on Wednesday, and persist on Thursday, Friday, and Saturday until hospitalization, which occurred on Sunday, 11-17. However, the testimony from the mother and grandmother, the two persons who almost exclusively spent Wednesday, Thursday, and Friday with the child, does not reveal any observations of the expected symptoms in the child. Not even on Saturday morning was there a mention of concern for the child's behavior or any symptoms out of the ordinary. Those symptoms were first noticed by the mother on Saturday evening upon her return home from shopping when she interacted with the child. It was then she realized he favored his left leg and would not bear weight on it.

The Court is both astonished and dumbfounded why the symptoms would be absent on Wednesday, 11-13, Thursday, 11-14, Friday, 11-15, and on Saturday morning of the 16th, but yet make such a sudden and demonstrative appearance on the afternoon of the same day, Saturday, 11-16, after being in the sole care of the father all day.

The parents assert that any number of drugs, among them Tylenol and Ibuprofen, may have masked the symptoms. However, the Court is not persuaded that the minimal doses of minor pain killers as mentioned in the testimony would mask the symptoms attendant to the child's femur fracture. Additionally, it is asserted, by the mother particularly, that she used extreme caution and care in her handling of the child while bathing him, changing his diapers, changing is clothes, etc., thus perhaps masking any symptoms the child may otherwise have exhibited such that they could not be readily detected by either parent. Further, they assert that even the administration of the flu shots to his leg must have been done with such great care as to mask any possible detection by medical personnel, a nurse and a doctor, of symptoms from the supposed Wednesday fracture. To this Court, that is inconceivable and not believable.

If the "walker" was the source and instrumentality of the leg fracture then, according to medical testimony, the symptoms attendant with such injury would have been present on Wednesday, Thursday, Friday, and on Saturday morning as they were on Saturday evening, or late afternoon that day. As well-intended as the grandmother's explanation may be, the Court discounts her story as the source of the leg fracture.

The Court is convinced that the leg fracture occurred on Saturday, 11-16, during the time he was in his father's care. Unfortunately, the details of how the child received the femur fracture has not been provided to the Court but sufficient and clear and convincing evidence has been established for the Court to conclude it was non-accidental trauma without a reasonable and acceptable explanation from either parent as to its causation.

UCA 78-3a-305.1, provides:

"In determining whether a minor is an abused child or neglected child it may be presumed that the person having the minor under his direct and exclusive care and control at the time of the abuse is responsible for the abuse or neglect." See State ex rel L.M. v. State, 2001 UT App. 314, 37 P.3d 1188.

This presumption is rebuttable, but the Court finds that the

father has failed to rebut it. Having rejected the grandmother's explanation that the incident which broke the child's leg occurred on Wednesday, 11-13, via the "walker", the legal presumption applies to the father as he had the child "...under his direct and exclusive care and control at the time of the abuse...", and is therefore legally responsible for the abuse and/or neglect.

As to the skull line discovered on x-rays taken of the child, the Court is convinced that it is the result of a fracture and not an associated suture. The Court is persuaded by Dr. Nixon's years of experience in the field and finds his testimony and opinion believable and more credible than the other experts who testified. In any event, the Court has already concluded the evidence is not clear and convincing that the skull fracture was non-accidental in nature.

Wherefore, based upon the foregoing Findings of Fact, the Court enters the following

Conclusions of Law:

1. That said child, Zachary, is an "abused child" in that he has suffered non-accidental physical harm, or negligent treatment, pursuant to UCA 78-3a-103(1)(a)(I);

2. That said child, Zachary, is a neglected child in that he has been subjected to mistreatment or abuse, pursuant to UCA 78-3a-103(1)(s)(i)(B);

3. That said child, Alexis, is a neglected child in that she is at risk of being a neglected or abused child because another child in the same home is a neglected or abused child, pursuant to UCA 78-3a-(1)(s)(i)(E).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court enters the following

Decree:

1. That this matter is set for a dispositional hearing on September 1st, 2005 @ 11:15AM, before Judge Nolan, at the Sandy Courthouse, 210 West 10000 South, Sandy, Utah;

2. That the Division of Child and Family Services is directed to submit a written reunification service plan for both parents for the Court's consideration, and that copies be provided to Court and counsel five (5) days prior to the hearing date scheduled above;

3. That previously conducted psychological evaluations of both parents be made available for the Court's consideration at the dispositional hearing;

4. Previous orders regarding custody, guardianship, and visitation shall remain as ordered pending further review and order of the Court.

Dated this 15th day of August, 2003.

Olof A. Johansson, Judge

cc: Blake Nakamura, attorney at law
Ron Wilkinson, attorney at law
Stephen and Lisa Bulmore, parents
Amy Jackson, Office of Attorney General
Rob Parrish, Office of Guardian ad Litem
Division of Child and Family Services

ATTACHMENT 2

In re Z.D. and A.D.,
2004 UT App 261.

*2004 UT App 261, *; 505 Utah Adv. Rep. 25;*
*2004 Utah App. LEXIS 82, **

State of Utah, in the interest of Z.D. and A.D., persons under eighteen years of age. S.B.D. and L.D., Appellants, v. State of Utah, Appellee.

Case No. 20030750-CA

COURT OF APPEALS OF UTAH

2004 UT App 261; 505 Utah Adv. Rep. 25; 2004 Utah App. LEXIS 82

July 29, 2004, Filed

NOTICE: [1]** THIS OPINION IS SUBJECT TO REVISION BEFORE PUBLICATION IN THE OFFICIAL REPORTER.

PRIOR HISTORY: Third District Juvenile, Salt Lake Department. The Honorable Olof A. Johansson.

DISPOSITION: Reversed.

CASE SUMMARY

PROCEDURAL POSTURE: The Third District Juvenile, Salt Lake Department (Utah), determined that one of appellant parents' children suffered a **femur fracture** while in the father's care, and concluded the child was abused and neglected while in the father's care, and that another was a neglected child as a result of being in the same home. The children were removed from the home. The parents appealed the adjudication, challenging the sufficiency of the evidence.

OVERVIEW: After the infant child was seen at a hospital, abuse was suspected and reported. The juvenile court determined that sufficient clear and convincing evidence had been established to conclude the child's broken leg was a non-accidental trauma without a reasonable acceptable explanation from either parent as to its causation. On appeal, the father argued the juvenile court erred in finding the State established abuse by clear and convincing evidence. None of the expert witnesses could provide an opinion as to how much force would be required to cause the **fracture** with either an axial load or a walker incident. Noticeably removed from the court's findings was any mention of, or explanation for, the absence of external injuries. If the **fracture** were caused by an axial load, the mechanism believed by some State witnesses to be the probable cause, it would almost always be accompanied by a soft tissue injury like bruising or swelling. The appellate court could not say that, given the evidence presented, the trier of facts could reasonably conclude that it was highly probable that the **fracture** was the result of nonaccidental trauma inflicted by the father.

OUTCOME: The judgment was reversed.

CORE TERMS: fracture, walker, symptom, leg, doctor, femur, axial, knee, bone, caretaker,

probable, trauma, fussy, left leg, nonaccidental, afternoon, leverage, swelling, bruising, morning, dose, load, pain, demonstration, teething, noticed, burrito, wrap, trier, clear and convincing evidence

LexisNexis(R) Headnotes ♦ Hide Headnotes

Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence Review

HN1 The standard for assessing whether evidence is "clear and convincing" has been articulated as follows: While it rests primarily with the trial court to determine whether the evidence is clear and convincing, its finding is not necessarily conclusive, for in cases governed by the rule requiring such evidence the sufficiency of the evidence to support the finding should be considered by the appellate court in the light of that rule. In such cases it is the duty of the appellate court in reviewing the evidence to determine, not whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, but whether the trier of facts could reasonably conclude that it is highly probable that the fact exists. More Like This Headnote

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN2 An appellate court does not give factual determinations made by a trial judge the same amount of deference given to factual determinations made by a jury -- that is, an appellate court does not, as a matter of course, resolve all conflicts in the evidence in favor of the appellee. More Like This Headnote

COUNSEL: Sara Pfrommer, Park City, for Appellants.

Mark L. Shurtleff and John M. Peterson, Salt Lake City, for Appellee.

Martha Pierce and Robert N. Parrish, Salt Lake City, Guardians Ad Litem.

JUDGES: Before Judges Billings, Bench, and Thorne. Judith M. Billings, Presiding Judge and William A. Thorne Jr., Judge, concur.

OPINIONBY: Russell W. Bench

OPINION: OPINION (For Official Publication)

BENCH, Associate Presiding Judge:

[*P1] S.B.D. and L.D. (Father and Mother) challenge the sufficiency of the evidence supporting the juvenile court's determination that Z.D., one of their children, suffered a **femur fracture** while in Father's care. After receiving evidence, n1 the court determined that "sufficient and clear and convincing evidence has been established . . . to conclude it was non-accidental trauma without a reasonable and acceptable explanation from either parent as to its causation." We reverse.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The trial court received evidence on thirteen different days, spanning the time from March 21, 2003 to June 12, 2003. Undoubtedly, this elongated trial made it difficult for the trial judge to recall the evidence and to place it all in context.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - **[**2]**

BACKGROUND

[*P2] Father took care of his infant son, Z.D., and two-year-old daughter, A.D., for most of the day on Saturday, November 16, 2002, while Mother was away from the home. Early that morning, before leaving, Mother gave Z.D. a dose of Tylenol for the earache, constipation, and teething that Z.D. had been experiencing in the days prior. He was not given another dose of Tylenol until later that evening. Z.D. took a nap in the afternoon. When Z.D. awoke, he was fussy, and Father noticed that he was favoring his left leg by holding his foot up so that it did not touch Father's lap. Father laid Z.D. in his lap and rubbed the leg because Father thought the flu shot Z.D. had received on Friday, November 15, 2002, was bothering him. Z.D. did not like having his leg rubbed and continued to be fussy. Father wrapped him up tightly in what the parents called a "burrito wrap" and held him. Z.D. stopped being fussy and appeared comfortable. When Mother returned home that evening, she also noticed that Z.D. was favoring his left leg. Mother and Father attributed Z.D.'s favoring of his left leg to the flu shot, but called Kids Care just to be sure. Kids Care reassured them that **[**3]** there was no need to worry, and that Z.D. did not need to be examined. That night Z.D. slept normally and did not display fussiness indicative of pain.

[*P3] On Sunday morning, November 17, 2002, when Z.D. continued to favor his left leg, Father took him to Primary Children's Medical Center (Primary) to be examined. The first doctor at Primary to examine Z.D. moved his leg around some, but could not find anything wrong. Another doctor came and placed Z.D. on an examination table. The second doctor pushed Z.D.'s legs up against his torso, straightened and bent his legs, and wiggled and moved them around. Z.D. cried fairly intensely. After Z.D.'s leg was x-rayed, Father was told that Z.D.'s left **femur** was fractured just above the knee. Z.D. was described by hospital workers as cheerful, interactive, alert, and slightly fussy, but consolable. At some point, Z.D. was examined by Dr. Bridgette Sipher. Sipher noted that Z.D. was in no apparent distress except when his left leg was manipulated. Additionally, there was no bruising anywhere on Z.D.'s body, and no fever, redness, or swelling. Sipher recommended Tylenol or ibuprofen for pain, with Lortab to be considered if necessary. **[**4]** Although there was decreased movement in Z.D.'s left leg, Z.D. was still moving it independently.

[*P4] In accordance with Primary's policy to notify the State whenever a **fracture** is discovered in a nonambulatory child, the emergency room staff immediately notified the Division of Child and Family Services (DCFS). n2 The emergency room staff also notified the Center for Safe and Healthy Families, a group at Primary responsible for identifying and investigating suspected cases of child abuse. Dr. Bruce **Herman,** a pediatrician and member of the Center for Safe and Healthy Families team, took charge of the investigation and examined Z.D. at Primary the following day, Monday, November 18, 2002. After interviewing Father and Mother, **Herman** concluded that Z.D. had become acutely symptomatic on Saturday, November 16, which would be consistent with the **fracture** occurring on that day. He also opined that the mechanism causing the **fracture** would most likely be excessive axial loading of the **femur,** and that the parents offered no history providing such a mechanism.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 Because of the abuse referral, Z.D. was admitted to the hospital.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

[5]**

[*P5] Because Father was employed by DCFS as an in-home child welfare worker, DCFS retained an independent investigator, Paul Dean, to conduct an investigation of the circumstances surrounding Z.D.'s **fracture.** Dean first saw Z.D. at Primary. Z.D. was wearing only a diaper, shirt, and fabric splint on his left leg. No marks were visible on Z.D.'s exposed body parts. When Dean interviewed Father and Mother, neither of them could provide an explanation consistent with the mechanism Dr. **Herman** had described.

[*P6] On Tuesday, November 19, 2002, Mother, Father, and Z.D.'s grandparents were at the hospital when **Herman** stopped by the hospital room. Mother's mother (Grandmother) asked Dr. **Herman whether the fracture** could have occurred during an incident with a baby walker on the previous Wednesday, November 13, 2002, where Z.D.'s leg became stuck in the walker and Grandmother released his leg by pulling it through the hole of the walker. **Herman** did not acknowledge the question and, instead, continued to talk. Grandmother asked the same question again. **Herman** continued to write on his notepad and then left the room. The next day, Grandmother again posed the walker question **[**6]** to **Herman,** who then said that the walker incident was not a possible cause of the **fracture.** He did not follow up on Grandmother's question at that time. n3

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 During trial, when asked about his response to Grandmother's inquiry, **Herman** testified that he did not feel that the walker incident would have created the appropriate mechanism, or the appropriate kind of force, to cause the **fracture.**

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*P7] Later, on December 11, 2003, the family requested a meeting with **Herman** and other members of the Center for Safe and Healthy Families in order to present the walker incident as a possible mechanism for the **fracture.** Grandmother gave a demonstration of how she had tried to place Z.D. in his walker, but his left leg became stuck, his knee bent with his foot behind him. In her attempt to extricate his wedged leg, she placed her left hand and thumbs on his left leg above his knee and pushed, and then pulled his foot down through the hole of the walker with her right hand. Z.D. let out a shrill, vigorous cry, but **[**7]** calmed down within fifteen seconds.

[*P8] In a separate meeting, after Grandmother demonstrated the walker incident, the Primary doctors met and agreed that their opinions were unchanged by the demonstration. Kari Cunningham, Primary's liaison to DCFS and a child protective services worker with DCFS, was present at the meeting with the doctors. She observed that the doctors agreed that someone could have caused the **fracture** using their hand, but that the force involved in the walker incident would not have been sufficient to cause the **fracture.** Cunningham testified that, in discussing the mechanism and forces involved, the doctors did not discuss the medications Z.D. had been taking, the fact that he was often placed in a burrito wrap, and Z.D.'s activities in the days between Wednesday and Saturday.

[*P9] Dr. G. William Nixon, a pediatric radiologist at Primary, did not participate in this meeting. Nixon had earlier opined that the **fracture** was not caused by direct axial loading, consistent with **Herman's** opinion, but rather was caused by angular leverage. Dr. John Smith, a pediatric orthopedist at Primary, was also not present during the walker demonstration on **[**8]** December 11, 2002, but was consulted via telephone. Smith wrote a letter dated December 11, 2002 in which he explained that the **fracture** could result from the forceful wedging of the leg over a fulcrum (as in the walker incident), but that it would be

"difficult to know the degree of force that would be required to produce this **fracture** by this mechanism."

[*P10] At trial, **Herman** elucidated his position regarding the possible mechanism of the **fracture:**

> We [the doctors] all agreed that that [the walker incident] would not be the typical mechanism or the one we would usually see to explain that **fracture** and I certainly have not said that that would have been impossible to be the mechanism. I have that -- and it's still my opinion that it was unlikely that that was the mechanism.

In clarifying his view, **Herman** said that while the walker incident was a possible mechanism for the **fracture,** it was not the likely mechanism. As to whether he significantly disagreed with Nixon as to the mechanism of the **fracture,** he answered, "Significant is a word -- I mean we had disagreements about the actual mechanism that could have caused this but would I describe **[**9]** them as significant? No, sir."

[*P11] On cross-examination, Dean said it would have been important for him to know whether there was a disagreement among the doctors as to the probable mechanism of the **fracture;** however, Dean was not made aware of the differing opinions. Dean also testified that he did not know, and did not consider the fact, that Z.D. had been taking Tylenol between the time of the walker incident and when he entered the emergency room on Sunday morning. Nor was Dean aware that Z.D. had been suffering from constipation and an earache, had been teething during that time period, and had received a flu shot on Friday. Dean admitted that all of these factors would have been important for him to know.

[*P12] In his testimony, **Herman** identified three factors to be considered in investigating Z.D.'s **fracture:** 1) the type of **fracture,** which helps to determine the mechanism and force; 2) the age of the **fracture;** and 3) the symptoms associated with the **fracture.** He explained that, taken together, these factors demonstrated that Z.D.'s **femur fracture** was the result of nonaccidental trauma inflicted on Saturday, November 16, rather than the walker incident **[**10]** on Wednesday, November 13.

[*P13] As to mechanism, **Herman** testified that he was "51/49" percent certain that the **fracture** was caused by a significant axial force applied to a bent knee. As to the force, **Herman** thought it unlikely that the walker could generate the forces required to **fracture the femur.** As to the age of the **fracture,** both Wednesday (the date of the walker incident) and Saturday (the date **Herman** noted Z.D. manifested symptoms), fit within the time period identified as when the **fracture** could have occurred. As to the type and timing of symptoms, **Herman** thought that if the walker incident had been the cause of the **fracture,** then Mother and Father would have noticed symptoms of a broken leg prior to Saturday. **Herman** maintained that symptoms of a broken leg would have been apparent, especially when Z.D.'s leg was moved during daily activities like diaper changes and clothing changes. Regardless of Z.D.'s teething, earache, constipation, taking of Tylenol, absence of external injuries, and the fact that he was often tightly swaddled in a burrito wrap, which mimicked a splint, **Herman** doubted that the symptoms of a broken leg could be hidden from a vigilant caretaker **[**11]** from Wednesday to Saturday.

[*P14] Mother and Father called a number of witnesses. David Ingebretsen, an expert in the field of bio-mechanical engineering, testified that the **fracture** pattern was consistent with the forces identified by the walker incident. Debbie Hosseini, a registered nurse who works with the early intervention program helping premature babies with their development,

had come to Z.D.'s home every month to observe him. She testified that he was a very happy baby, always smiling, and very easy to console. She never saw any bruising or swelling on Z.D.

[*P15] Finally, Dr. Steven Scott, an expert in pediatric orthopedics, gave extensive testimony. Scott testified that the **femur fracture** did not follow the typical pattern of nonaccidental trauma, and he disagreed with **Herman** as to the probable mechanism. After examining the **fracture** pattern, and feeling that it did not fit the typical pattern that is normally seen with nonaccidental trauma, he wanted to know if there was an explanation for the **fracture** that fit the **fracture** pattern. Scott believed that the **fracture** pattern required a marriage of two forces in the same mechanism. He thought that Grandmother's **[**12]** walker demonstration "mimicked the forces exactly that would be needed to produce the **fracture** pattern." As to the force, he testified that there is no real way to know how much force is required to break a bone on a particular person, but the walker incident created a leverage force, and leverage forces create great force when little force is applied. Additionally, the area of the bone where the **fracture** occurred was a weaker area of the **femur,** and Z.D.'s delayed bone age gave him a weaker bone because it had less mass and was composed of immature woven bone, making it structurally weak.

[*P16] In discussing the symptoms of a **fracture,** Scott agreed with **Herman** that bone pain is typically worse with any kind of manipulation or movement, but thought that in a child of Z.D.'s age, symptoms would be more generalized fussiness, irritability, crying, and lack of movement of his leg. He also explained that wrapping Z.D. in a burrito wrap would influence a caretaker's ability to detect symptoms because swaddling is exactly what happens when a child has a splint. Scott's opinion as to the onset of symptoms was also different from **Herman's.** Scott did not find it remarkable for three **[**13]** days to elapse before Mother and Father noticed symptoms of the **fracture.** As examples, Scott said that in the eighteen years he had been involved in taking care of children's **fractures,** it was not uncommon to see even a verbal child brought in two or three days after the injury because the parents attributed the symptoms to something else. He had also seen nonverbal children who had **fractures** for days, or even more than a week, before caretakers (or medical professionals) realized there was a problem that required medical attention. Scott pointed to the numerous physicians who examined Z.D. at Primary and described him as cheerful, interactive, alert, and fussy, but consolable. At the hospital, Z.D. presented neither localized nor generalized symptoms. Further, at least six physical examinations of Z.D. specifically noted that there were no skin lesions, bruises, lacerations, abrasions, burns, or scars. Scott concluded that if the mechanism that caused the **fracture** were a direct force, as **Herman** believed it to be, then he would expect bruising around the leg because the force it takes to bruise soft tissues is less than the force it takes to break a bone. On the other hand, with the **[**14]** walker incident, the amount of force needed to be applied to the skin in order for the **femur to fracture,** is well below the amount required to bruise the skin. He also cited a study where over ninety percent of the children with suspected nonaccidental **fractures** also had soft tissue injuries.

[*P17] After receiving all of the evidence, the juvenile court found that **Herman** "unequivocally testified that the **femur fracture** was the result of non-accidental trauma, and would have required significant and excessive force to cause such a complex **femur fracture.**" The court was convinced that the **fracture** occurred on Saturday when Z.D. was in Father's care because the court was both "astonished and dumbfounded" as to why the symptoms would be absent on Wednesday, Thursday, Friday, and on Saturday morning, "but yet make such a sudden and demonstrative appearance on the afternoon of the same day."

[*P18] The court concluded that Z.D. was abused and neglected while in Father's care, and that A.D. was a neglected child as a result of being in the same home as Z.D. See Utah Code Ann. § 78-3a-103(1)(s)(i)(E) (2002). Z.D. and A.D. were removed from **[**15]** the home. The court ordered DCFS to submit a reunification service plan. n4 Father and Mother appeal

the trial court's adjudication.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n4 Father and Mother successfully completed their service plan. DCFS involvement was eventually terminated, and the children were returned to the custody of Father and Mother without condition.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

ISSUE AND STANDARD OF REVIEW

[*P19] Father argues that the juvenile court erred in finding that the State established abuse by clear and convincing evidence. See Utah R. Juv. P. 41(b). HN1 The standard for assessing whether evidence is "clear and convincing" has been articulated as follows:

> While it rests primarily with the trial court to determine whether the evidence is clear and convincing, its finding is not necessarily conclusive, for in cases governed by the rule requiring such evidence the sufficiency of the evidence to support the finding should be considered by the appellate court in the light of that rule. . . . In such cases it is the duty of the appellate court **[**16]** in reviewing the evidence to determine, not whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, . . . but whether the trier of facts could reasonably conclude that it is highly probable that the fact exists.

Lovett v. Continental Bank & Trust Co., 4 Utah 2d 76, 286 P.2d 1065, 1068 (1955) (quotations and citations omitted) (emphasis added). HN2 "An appellate court does not give factual determinations made by a trial judge the same amount of deference given to factual determinations made by a jury -- that is, an appellate court does not, as a matter of course, resolve all conflicts in the evidence in favor of the appellee." Alta Indus. v. Hurst, 846 P.2d 1282, 1284 n.2 (Utah 1993) (citations omitted).

ANALYSIS

I. Type of **Fracture**

[*P20] Even disregarding the testimony of defense witnesses Ingebretsen and Scott, who both testified that the **fracture** pattern was consistent with the forces identified by the walker incident, the remaining evidence presented varying opinions as to the probable mechanism. n5 Contrary to the court's finding, **Herman's** testimony **[**17]** was anything but "unequivocal." He testified that he could only be "51/49" percent certain that the **fracture** was caused by a significant axial force applied to a bent knee. This testimony, standing alone, is far from clear and convincing. Further, neither one of the State's own witnesses -- Smith and Nixon -- bolstered the opinion of **Herman.** Although Smith refrained from estimating the degree of force required, he thought the **fracture** could have resulted from the walker incident. Nixon thought the probable cause of the **fracture** was angular leverage.

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n5 Scott agreed that an axial load could cause such a **fracture.** He described two possible scenarios: 1) the child stands with locked knees and is then slammed down or dropped, so that the force passes through the feet and into the knee and **femur;** and 2) the child experiences a blow to the end of the knee, directly over the kneecap. He explained that the first instance was unlikely because Z.D., as a nonambulatory child, did not have the muscle tone to stand and lock his knees. Additionally, the **fracture** pattern did not match that scenario. The second instance was unlikely because a direct blow strong enough to **fracture** a bone should leave a contusion, swelling, or welt over the kneecap. Again, the **fracture** pattern was not consistent with such a mechanism.

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[18]**

[*P21] As explained by both Scott and Ingebretsen, and uncontested by any of the State's witnesses, if the mechanism causing the **fracture** is assumed to be the result of an axial load, then more force would be required to cause the **fracture** than would be required by the leverage force created by the walker incident. None of the expert witnesses could provide an opinion as to how much force would be required to cause the **fracture** with either an axial load or the walker incident.

II. Age of **Fracture**

[*P22] Both Wednesday and Saturday fall within the time period identified by the experts as to when the **fracture** likely occurred; thus, this factor does not help to establish that the **fracture** occurred on Saturday.

III. Symptoms Associated with **Fracture**

[*P23] There was a great deal of conflicting evidence associated with the type and timing of symptoms. The court was "both astonished and dumbfounded" as to why the symptoms would be absent on Wednesday, Thursday, Friday, and Saturday morning, and "yet make such a sudden and demonstrative appearance on the afternoon of the same day." Yet, the court also recognized that Father saw very little of Z.D. on Wednesday, **[**19]** Thursday, and Friday, so that when the symptoms seemed to Father to "suddenly appear" on Saturday, Father had no way of comparing the symptoms exhibited on Saturday with the symptoms exhibited in the days prior. Further, the court did not acknowledge that Mother had given Z.D. regular doses of Tylenol on Wednesday, Thursday, and Friday, with the last dose being given at approximately 4:00-5:00 a.m. on Saturday. Even then, the court was not persuaded that "minimal doses of minor pain killers" could mask Z.D.'s symptoms. Yet, the State's witness, Sipher, testified that Tylenol may very well influence whether a caretaker is able to detect symptoms of an injury. **Herman** testified that children with **fractures** are prescribed something stronger than Tylenol or ibuprofen for pain, and he was surprised to find that the emergency department had initially given Z.D. only Tylenol after discovering the **fracture.**

[*P24] The court found that "medical experts testified and generally agreed that the pain and the symptoms attendant to the leg **fracture** would be significant and that the **fracture** would be extremely painful"; further, that the symptoms would be "readily detectable and observable **[**20]** by a caretaker." Yet the court made no mention of Sipher's testimony that it would not be surprising for the caretakers to attribute Z.D.'s fussiness to teething. Defense witness, Scott, testified that, in his eighteen years of treating children's **fractures,** it was not uncommon for nonverbal children, in the charge of medical professionals, to go for days, or even a week, after sustaining a **fracture** before receiving treatment because the medical professionals did not realize that a **fracture** had occurred. The court found that

Father described Z.D.'s symptoms as significant, and that the hospital physicians and other doctors confirmed this description. Yet, Scott pointed to the medical reports from Primary itself, wherein Z.D. was described as cheerful, interactive, alert, and fussy, but consolable. Even when the first doctor at Primary examined Z.D. and moved his leg, he could not find anything wrong.

[*P25] Perhaps the most significant symptom was the one not present. Noticeably removed from the court's findings and the State's case entirely, is any mention of, or explanation for, the absence of external injuries. Z.D. sustained no lesions, welts, bruising, swelling, redness, **[**21]** burns, abrasions, lacerations, or scars. If the **fracture** were caused by an axial load, the mechanism believed by some State witnesses to be the probable cause, it would almost always be accompanied by a soft tissue injury like bruising or swelling.

[*P26] Because the "explanations as to the cause of the injury provided by the parents [was] inconsistent with the medical testimony," the court determined that clear and convincing evidence had established that the **fracture** occurred on Saturday afternoon while Z.D. was in Father's care. However, we cannot say that, given the evidence presented, "the trier of facts could reasonably conclude that it [was] highly probable" that the **fracture** was the result of nonaccidental trauma inflicted by Father on Saturday afternoon. Lovett v. Continental Bank & Trust Co., 4 Utah 2d 76, 286 P.2d 1065, 1068 (1955).

CONCLUSION

[*P27] The evidence does not clearly and convincingly establish that Z.D.'s **fracture** was caused by an axial load sometime on Saturday when he was in Father's care.

[*P28] We therefore reverse.

Russell W. Bench,

Associate Presiding Judge

WE CONCUR:

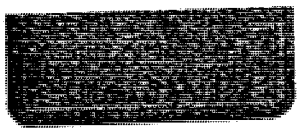
Judith M. Billings, **[**22]**

Presiding Judge

William A. Thorne Jr., Judge

ATTACHMENT 3

June 12, 2003 Affidavit of
Bruce Herman, M.D.
State's Exh. 39.



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IN THE THIRD DISTRICT JUVENILE COURT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, in the interest of DUNSMORE, ALEXIS (09/19/00) DUNSMORE, ZACHARY (04/06/02) Child(ren) under 18 years of age.	AFFIDAVIT OF DR. BRUCE HERMAN Case No. 169373, 169372 Judge Johansson

I, Dr. Bruce Herman, state under oath, as follows:

1. I met with Lisa and Brig Dunsmore, on both November 18th and 19th, 2002, at Primary Children's Medical Center. I also talked briefly with the maternal grandmother, Linda Johnson, on November 19, 2003.

2. I do not believe that Lisa Dunsmore asked me on November 18th or 19th whether Zachary's leg fracture could have been caused in a baby walker. The first time I heard mention of a walker as a possible cause of the broken leg was on November 19, 2002, when the maternal grandmother, Linda Johnson, asked me if Zachary's leg being caught in a baby walker could have caused the fracture. No other details were offered at that time, and no date was mentioned by Ms. Johnson of what happened. At no time during any of my conversations with the parents and Ms. Johnson did anyone state that Lisa had been present when the baby's leg was

manipulated in the walker. That includes on December 11, 2002 when the entire Safe and Healthy Families Team of physicians met with the extended family and were told the details by Ms. Johnson.

3. In my meetings with Brig and Lisa Dunsmore, I specifically asked them if Zachary had shown any sign of favoring his left leg or any change from his "baseline" of fussiness during the week preceding his admission to Primary Childrens' Hospital on November 17, 2002. Neither of them could identify any signs that his leg was in pain or that there was any change in his "baseline" behavior until after noon on Saturday, November 16, 2002. Neither Brig nor Lisa Dunsmore told me in those meetings that Brig Dunsmore had not even provided care for Zachary from Wednesday the 13th of November until Saturday morning the 16th of November. Brig and Lisa were asked specifically if Zachary had shown any signs of pain when his clothes or diapers were changed during the prior week and both denied he had shown any signs of pain. Neither Brig nor Lisa Dunsmore told me that they changed his diapers and his clothes without touching or manipulating his left leg.

4. Both Lisa and Brig Dunsmore told me on November 18, 2002, that Zachary had been bearing weight on both his legs the morning of November 16, 2002 prior to Lisa leaving the home. Further, Brig Dunsmore told me that Zachary had been bearing weight on both his legs after Lisa left to go shopping that same morning and that he had been "fine". The Dunsmores told me in these meetings that Zachary liked to bounce on their knees. They demonstrated with their hands how this happened.

5. If Brig and Lisa Dunsmore have testified in the juvenile court trial that they never said Zachary had been bearing weight on both legs on Saturday morning, November 16, 2002, I believe they are mistaken. I did not make up that detail, and Lisa Dunsmore repeated that detail during the family meeting on December 11, 2002, having been specifically asked about that by

Dr. Lori Frasier.

Dated this 11 day of June, 2003

- be herman

Bruce Herman, M.D.

Subscribed and sworn to before me this 11th day of June 2003.

NOTARY PUBLIC
SUSAN K. GREAVES
100 No. Medical Drive
Salt Lake City, Utah 84113
My Commission Expires
September 14, 2005
STATE OF UTAH

Susan K. Greaves

Notary Public residing in
Salt Lake County
My Commission Expires 9-14-05

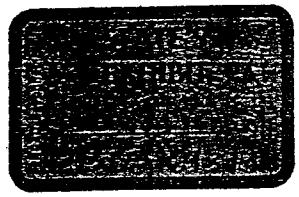
ATTACHMENT 4

Letter from Bruce Herman, M.D.,
Karen Hansen, M.D. and
Lori D. Fraiser, M.D.
December 17, 2002.
State's Exh. 7.

IHC PRIMARY CHILDREN'S MEDICAL CENTER
A Service of Intermountain Health Care

100 North Medical Drive
Salt Lake City, Utah 84113
(801) 588-2000
(801) 588-2460 Fax

December 17, 2002



RE: ZACHARY DUNSMORE
DOB: 4/6/02

On December 11, 2002 a meeting was held with the family of Zachary Dunsmore to provide further information concerning his injuries. Present at the meeting were physicians from the Safe and Healthy Families, Dr. Bruce Herman, Dr. Karen Hansen and Dr. Lori Frasier. Julie Bradshaw from Safe and Healthy Families was also present. Paul Dean from SIPAPU and Kari Cunningham from DCFS were present. The child's pediatrician Dr. Dave Folland was present. Zachary's mother and father Lisa and Brigg Dunsmore as well as Brigg's father and Lisa's parents Linda and Brent Johnson were present. The purpose of the meeting was to clarify history from the family concerning Zachary's injuries.

Grandmother gave a history of changing Zachary's diaper on November 21st. She states that he tried to reach down and grab his left foot and bent his leg up and she heard a painful cry. This reminded her of a previous event that occurred on November 13th. She had gone to Zachary's home at approximately 11 AM. She tried to place him in his walker. She brought this walker today and used it to demonstrate the history provided. His right foot made it through the hole in his walker but his left leg became stuck. His knee bent with his foot behind him. Grandmother states that she pushed with her left hand and thumbs on his left leg above his knee and with her left hand and pulled down his foot with her right hand. She states that he cried vigorously but calmed down within 15 seconds. She states that after that time he used his leg normally. Further questioning to the family revealed that they did not notice Zachary to be in pain over the next few days. Specifically they were able to get him into and out of his pajamas and change his diaper without significant pain. On Friday November 15th he was seen by Dr. Folland. Dr. Folland did not note any abnormalities in his leg exam. The child was given a flu shot in his left leg. Mother states that the nurse held his left leg down while he was sitting in her lap. She states that he did cry with the shots and mother could not differentiate pain from Zachary being held down versus pain from the shot.

The events of Saturday November 16 were also reviewed. Mother states that she got up in the morning and placed Zachary on the floor and that he played on the floor. He was placed in his walker for a brief time as well. She did not notice anything unusual about his behavior that morning and left at approximately 1010. She got back at approximately 1830 and at that time noted that he was not moving his left leg and appeared to be in pain when his leg was palpated. The family sought care the next

morning because of the continued symptoms and an x-ray performed at that time revealed a left femur fracture. Brigg was unable to provide any history of the events while he was caring for Zachary on advice from his lawyer.

Lisa then provided a history that she felt may have caused his skull fracture. She relates an incident occurring during the week before Halloween. Mother states that she placed him in a Graco swing. She brought the swing today and demonstrated the history she provided. She turned on the swing and went to the bathroom. When she was coming out of the bathroom she heard a thump and then heard Zachary cry. She states that she found him lying face up on the bar of the swing. She picked him up and he stopped crying immediately. She states that he continued to act normally and eat well for the rest of that day and the next several days. Mother does not remember any swelling nor tenderness of his scalp. The surface of the floor was a padded burbor carpet.

During the meeting several family members spoke, supporting the family. Dr. Folland also spoke positively of the parents, grandparents, and extended social support system. Dr. Folland spoke of Zachary as a very happy, mellow infant. Of note was that Mr. Johnson remarked that Zachary did have periods of fussiness, usually in the evening, and that he calmed when being held.

Drs. Herman, Hansen and Frasier subsequently met with Kari Cunningham and Paul Dean. Dr. John Smith was also consulted. The films were reviewed with Dr. Smith and the proposed mechanism was discussed. It was felt by the physicians from Safe and Healthy Families as well as Dr. Smith that unreasonable forces would have been required to cause the femur fracture. It was also felt that Zachary would become symptomatic soon after the injury. There had been concerns from the family and Dr. Folland about Zachary's high pain threshold. It should be noted that numerous witnesses have stated that Zachary responded appropriately to painful stimuli. This included his flu shot on Friday November 15th as well as an intramuscular injection that Paul Dean witnessed Zachary receiving in the hospital. In view of Zachary's apparently normal pain response, it is highly unlikely that Zachary would have remained asymptomatic for several days after an injury on November 13th and then become symptomatic on November 16th. It is also highly unlikely that the mechanism described by Grandmother caused the fracture.

The mechanism for the skull fracture was also discussed. It was felt that the episode described by mother would be highly unlikely to cause an occipital skull fracture. The occipital bone is quite difficult to fracture and would require significant force. A minor fall such as described by mother would be unlikely to provide the necessary forces to fracture the occipital bone.

No history has been provided to adequately explain either Zachary's femur fracture or his skull fracture. Therefore, non-accidental injury must be highly considered. This was discussed with Paul Dean as well as with Kari Cunningham. It was also discussed in a subsequent meeting with Dr. Folland.

It is our feeling that Zachary and his parents have significant social support systems. It is our opinion that the risks of subsequent injury to Zachary are low in his present social situation. We will work with DCFS and SIPAPU to arrange a protective situation that is equitable to the family while still providing safety for Zachary.

It should be noted that Zachary's follow up skeletal survey on December 2nd showed no new injuries. It showed a well-developed callus of his left femur.

-bherman

Bruce Herman, M.D.
Associate Professor
University of Utah Health Sciences Center
Center for Safe and Healthy Families
Primary Children's Medical Center

-Karen Hansen

Karen Hansen, M.D.
Associate Professor
University of Utah Health Sciences Center
Center for Safe and Healthy Families
Primary Children's Medical Center

Lori Frasier NP

Lori D. Frasier, M.D.
Associate Professor
University of Utah Health Sciences Center
Center for Safe and Healthy Families
Medical Director, Medical Assessment Team
Primary Children's Medical Center

cc: Kari Cunningham, DCFS
Paul Dean, SIPAPU

ATTACHMENT 5

John T. Smith Letter
December 11, 2002.
Def. Exh. 15.

CORRECTED COPY 12/12/02

DUNSMORE, ZACHARY A
Chart #31266

December 11, 2002

This note is dictated in clarification of the injuries sustained by Zachary and addresses possible etiology and mechanism. This note is generated to clarify issues and possible mechanism related to this fracture. My first evaluation of Zachary occurred on November 27, 2002. At that time, he was noted to have a fracture of the metaphysis of the distal femur, which had significant fracture callus present. At that time, it was my impression that the fracture was between 14 in 20 days out from the initial injury.

In reviewing the chronology of this fracture, the grandmother noted that she possibly injured the leg by placing the leg through the footing of the walker on November 13, 2002. The child was taken in for routine immunizations on November 15. At that time, it was felt the child did not have pain in the distal femur while being held down for these immunizations. He was seen for his initial evaluation of this fracture on November 17, 2002, at which time the distal metaphyseal fracture was documented. I was not involved in his care until November 27, 2002.

Regarding possible etiology, the most common way that I've seen this fracture is due to an accidental fall off a bed while engaging in diaper changing or other activities. I explained to the family that the fracture could occur as a result of a forceful wedging of the leg over a fulcrum. It is difficult to know the degree of force that would be required to produce this fracture by this mechanism. There are certainly no biomechanical testing or other guidelines to determine this degree of force. In addition, I feel that once this type of fracture occurred, given the amount of displacement on the initial film, that we would expect to have significant pain with activities such as diaper changing or any manipulation of the limb. It is, therefore, difficult to match the chronology of the fracture to the onset of symptoms being approximately three days later. I cannot determine a fracture etiology with any certainty based on the fracture pattern that is seen.

This information was discussed with Dr. Bruce Herman and the Child Protection Team, and I was asked to document it for the medical record.

John T. Smith, M.D.

CC: Bruce Herman, M.D.
David Folland, M.D.

ATTACHMENT 6

Utah Supreme Court Order
Granting Certiorari
December 22, 2004.

IN THE SUPREME COURT OF THE STATE OF UTAH

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State of Utah, in the interest of,

Z.D. and A.D.,

children under eighteen years of age,

Case No. 20040837-SC

State of Utah

Petitioner

v.

S.B.D. and L.D.,

Respondents.

ORDER

This matter is before the court upon the Petitions for Writ of Certiorari, filed by the State of Utah and the Guardian ad Litem on September 29, 2004.

IT IS HEREBY ORDERED, pursuant to Rule 45 of the Utah Rules of Appellate Procedure, the Petition for Writ of Certiorari is granted only as to the following issue:

Whether the court of appeals applied the correct standard of review in its assessment of the sufficiency of the evidence.

FOR THE COURT:

December 23, 2004
Date

Christine M. Durham
Chief Justice